Chang Pew and by one of the purchasers from Seremban, in the instant case, that Phang was acting as agent for the Federation purchasers of the goods in making the Customs declaration, it was impossible to hold that there was any relationship of principal and agent between the appellant and Phang.

The appeal is accordingly allowed, and the conviction of the appellant quashed. I order that the fine paid be refunded and also set aside the order for confiscation. By reason of this appeal being allowed, the order made with regard to Phang Chang Pew cannot stand, and I accordingly set aside the order relating to him also.

*Appeal allowed.*

Solicitors: *Boswell, Hsieh & Lim.*

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## ABDUL JABBAR v. A. MOHAMED SHARIFF & CO., LTD.

[O.C.J. (Ambrose J.) June 8, 1961]
[Singapore — Suit No. 1098 of 1959]

[C.A. (Rose C.J., Tan Ah Tah and Chua JJ.) October 20, 1961]
[Singapore — Civil Appeal No. 11 of 1961]

*Estoppel — Preliminary issue — Defence of res judicata — Estoppel by record or issue estoppel — Reference to record of earlier proceedings — Whether rule permitting such reference limited to cases of estoppel by res judicata.*

On September 24, 1953, the present defendants obtained judgment against the present plaintiff for $40,125.54 in Suit No. 1532 of 1953. In the present suit the present plaintiff claims (a) a declaration that the present defendants' rights under the judgment were superseded by an alleged instrument of compromise dated the 29th October, 1953, and (b) repayment of $3,192.85 being the amount by which the sum received by the present defendants on execution of the judgment exceeds the sum due to them under the alleged instrument of compromise. By consent of the parties a preliminary issue was tried as to whether the present plaintiff was estopped from making his present claim by the dismissal of his application by summons in Chambers dated the 3rd April, 1958, in the former suit for an order that satisfaction of the judgment be entered. To ascertain the issue decided by the then Chief Justice when he dismissed the application by summons in Chambers, it was necessary to examine his grounds of decision. The question arose whether it was open to the trial Judge in the present case to do so.

**Held:** (1) on the facts, the estoppel by judgment relied on by the defendants was an estoppel by record or issue estoppel as opposed to an estoppel by *res judicata* affecting the entire cause of action;

(2) the rule that to ascertain what was actually decided at an earlier trial the Court may refer to the record of the earlier proceedings is not limited to cases of estoppel by *res judicata* but applies also to cases of estoppel by record;

(3) the point decided by the then Chief Justice when he dismissed the application by summons in Chambers was that the present defendants had reasonable grounds for refusing to give consent to entry of satisfaction of judgment, as it was by no means clear that the compromise was binding; that was entirely different from the point in the present proceedings, namely, whether the compromise was binding; and the plea of estoppel by record therefore failed.

*Cases referred to:—*

(1) *Outram* v. *Moorewood* (1803) 3 East 346.
(2) *Hoystead* v. *Federal Commissioner of Taxation* (1921) 29 C.L.R. 561.
(3) *Blair* v. *Curran* (1939) 62 C.L.R. 531, 532.
(4) *Re Bank of Hindustan, China and Japan, Alison's Case* (1873) 9 Ch. App. 1 at p. 26.
(5) *Flitters* v. *Alfrey* (1874) L.R. 10 C.P. 29.
(6) *Marginson* v. *Blackburn Borough Council* [1939] 1 All E.R. 273.
(7) *Ord* v. *Ord.* [1923] 2 K.B. 432.

On appeal by A. Mohamed Shariff & Co., Ltd., the defendants, against the decision of the learned trial Judge as regards point (3),

**Held:** (1) the point decided by the then Chief Justice in Suit No. 1532 of 1953 was that the judgment creditor, A. Mohamed Shariff & Co., Ltd., had reasonable grounds for refusing to give consent to the entry of satisfaction of judgment as it was by no means clear that the compromise was binding;

(2) the then Chief Justice did not presume to decide the question of the validity of the compromise, which was the point to be decided by the High Court;

(3) the order of the High Court was right.

CIVIL SUIT.

*K. E. Hilborne* for the plaintiff.

*T. H. A. Potts* for the defendants.

*Cur. Adv. Vult.*

**Ambrose J.:** On the 24th September, 1953, the present defendants, obtained judgment for $40,125.54 against the present plaintiff in Suit No. 1532 of 1953. In the present suit the present plaintiff claims (1) a declaration that the present defendants' rights under the judgment were superseded by an alleged instrument of compromise dated the 29th October, 1953, and (2) repayment of $3,192.85, being the amount by which the sum received by the present defendants on execution of the judgment exceeds the sum due to them under the alleged instrument of compromise.

In paragraph 10 of the amended defence it is alleged that the present plaintiff is estopped from making his present claim by the dismissal of his application by summons in Chambers dated the 3rd April, 1958, in the former suit for an order that satisfaction of the judgment be entered.

By consent of the parties, the defence of estoppel by judgment was taken as a preliminary point of law. It appeared from the way in which it was pleaded that the alleged estoppel related to the entire cause of action. Such a defence is treated as a defence of *res judicata* in *Halsbury's Laws of England*, 3rd ed., Vol. 15, at p. 184. There it is said :

> " Where *res judicata* is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact."

It appeared, however, from the argument of counsel for the defendants that the alleged estoppel related to a particular issue decided at the hearing of the summons in Chambers. He cited *Outram* v. *Moorewood*, (1) and submitted that a party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. This kind of estoppel by judgment is referred to at page 182 of *Halsbury's*

*Laws of England,* 3rd ed., Vol. 15, in these terms :

" If, however, a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established, as where the same cause of action has never been put in suit."

Such an estoppel is termed an estoppel by record in *Halsbury's Laws of England,* 3rd ed., Vol. 15, p. 184, note (a), and p. 208, note (k). It was called "issue estoppel" by Higgins J. in the Australian case of *Hoystead v. Federal Commissioner of Taxation.*[2] The term "issue estoppel" was adopted by Dixon J. (as he then was) in *Blair* v. *Curran.* [3] In my view, the Australian term "issue estoppel" is to be preferred to estoppel by record : as the latter is used sometimes for estoppel by *res judicata* in the sense defined above, and sometimes as including both estoppel by *res judicata* and issue estoppel.

I considered it highly improbable that any cause of action based on the alleged instrument of compromise could have been determined on the merits on an application by summons in Chambers in the former suit, as such a cause of action could not be litigated in that suit. I formed the opinion, therefore, that the estoppel by judgment relied on by the defendants was an estoppel by record, that is, an issue estoppel as opposed to an estoppel by *res judicata* affecting the entire cause of action.

To ascertain the issue decided by the then Chief Justice when he dismissed the application by summons in Chambers, it seemed to me necessary to examine his grounds of decision. The question arose whether it was open to me to do so. In a case of estoppel by record as opposed to estoppel by *res judicata,* Mellish L.J. said in *Re Bank of Hindustan, China and Japan, Alison's Case*[4] :

" I doubt whether technically we could have looked at what was said by the Judges for the purpose of discovering what were the real grounds of their decision."

This view, however, has not been followed in a number of cases. In a proper case, even oral evidence has been received for the purpose of determining the grounds of judicial decision and the intention of the Court to adjudicate, or not to adjudicate, upon any specific issue : *Flitters* v. *Alfrey.*[5] I thought it proper and necessary to order affidavits to be filed by the counsel concerned, stating the circumstances in which the application by summons in Chambers came to be dismissed, and adjourned the hearing of the case.

The hearing was continued the next day, when counsel for the plaintiff produced a certified copy of the notes of the proceedings in Chambers made by the then Chief Justice on the 14th and 25th April, 1958. Counsel for the defendants objected to my referring to these notes of the proceedings. It seemed to me that the case of *Marginson* v. *Blackburn Borough Council,*[6] was sufficient authority for me to do so. In that case the Court of Appeal in England referred to the reasons given by the County Court Judge : these were contained in a copy of the transcript of the shorthand notes of the judgment which was not included in the file of the County Court proceedings. Slesser L.J. said (at page 278) :

" I can see in principle no objection, when the question before the Court is what was actually decided at an earlier trial, to having recourse to that information which is to be derived from reading a record of the proceedings themselves."

It must be conceded that, when he said those words, Slesser L.J. was considering cases of estoppel by *res judicata* as opposed to cases of estoppel by record. But *Marginson's* case, in my opinion, raised a question of estoppel by record and not of estoppel by *res judicata.* So did the case of *Ord. v. Ord.*[7] which Slesser L.J. relied on as authority for the principle laid down by him. In my view, that principle is not limited to cases of estoppel by *res judicata* and applies to cases of estoppel by record as well. I, therefore, overruled counsel's objection.

According to the Chief Justice's notes, this is what took place before him in Chambers on the 14th April, 1958. Counsel for the present plaintiff asked that issues be framed. The Chief Justice replied that it was quite inappropriate to frame issues as there was no action pending : and that a suit would have to be instituted for a declaration as to the rights of the present plaintiff under the instrument of compromise. Counsel for the present plaintiff then asked the Chief Justice to adjourn the application to enable the present defendants to file an affidavit in reply. He submitted that the Chief Justice could, upon reading such affidavit, decide under Order 40, Rule 26, of the Rules of the Supreme Court, 1934, whether the present defendants had reasonable grounds for refusing to give consent to entry of satisfaction of the judgment debt in the Cause Book. The application was accordingly adjourned to the 25th April, 1958. According to the Chief Justice's notes, this is what happened when the hearing was resumed. Counsel for the present defendants submitted that the compromise never became binding, as all the creditors of the present plaintiff did not sign it. The Chief Justice held that, in his opinion, the present defendants had reasonable grounds for refusing to give the desired consent, because it was by no means clear that the compromise was binding; and accordingly dismissed the present plaintiff's application with costs.

Counsel for the defendants contended that the Chief Justice decided that the present plaintiff had failed to prove that the compromise was binding in so far as the present defendants were concerned. Counsel for the plaintiff contended that the Chief Justice did not actually decide that the compromise was not binding.

In my judgment, the point decided by the Chief Justice was that the present defendants had reasonable grounds for refusing to give consent to entry of satisfaction of judgment, as it was by no means clear to the Chief Justice that

the compromise was binding. That, in my opinion, was entirely different from the point to be decided by me, which was whether the compromise was binding. I, therefore, held that the plea of estoppel failed.

COURT OF APPEAL.

*H. E. Cashin* for the appellants.

*K. E. Hilborne* for the respondent.

**Rose C.J.:** In paragraph 10 of their amended defence to the principal action the defendants appellants contend that the plaintiff is estopped in his claim for a declaration and for the repayment of a certain sum of money by reason of the fact that the same matter had already been adjudicated upon by way of a summons-in-chambers dated the 3rd of April 1958 before the then Chief Justice.

This question was dealt with, by consent, as a preliminary point by the learned trial Judge and he ruled that the point of law decided by the then Chief Justice and that which had to be determined in the present case are not the same. Reference to the notes of the proceedings at the hearing of the summons-in-chambers in 1958, which was for an order of entry of satisfaction of a judgment dated the 24th of September 1953, shows that in the first instance learned counsel in the case was of the view that the question to be determined was whether the compromise in question was valid. He thereupon asked for issues to be framed, to which course counsel for the plaintiff/respondent had no objection.

The learned Chief Justice, however, pointed out — in my opinion correctly — that it was inappropriate at that stage to frame issues in this matter as there was no action pending and that it would be for the defendants to bring a suit for a declaration as to their rights under the deed if they wanted that matter decided.

Whereupon learned counsel for the defendants/appellants asked for an adjournment to enable his opponent to file an affidavit in reply so that the Court would be in a position to say whether, within the meaning of Order 40 rule 26 of the Rules of the Supreme Court, the judgment creditor had reasonable ground for refusing to give consent to the entry of satisfaction.

Thereupon the proceedings were adjourned from the 14th of April 1958 to the 25th of April 1958. At the resumed hearing both counsel were heard and the learned Chief Justice then gave on oral decision which he noted in the following terms:—

> " I say that the only point I have to decide is whether the judgment creditor has reasonable ground for refusing to give consent.
>
> I say that in my opinion he has reasonable grounds because it is by no means clear that the compromise is binding."

It seems to me to be abundantly clear from this wording that the learned Chief Justice did not presume to decide the question of the validity of the compromise but merely whether or not there was an arguable case that the compromise was not binding.

Indeed from the material at his disposal it would have been difficult, if not impossible, for him to have decided anything more than he purported to do.

It was for these reasons that we were of opinion that the order of the learned trial Judge was right; and ordered that the appeal must be dismissed with costs.

**Tan Ah Tah** and **Chua JJ.** concurred.

*Appeal dismissed.*

Solicitors: *Rodyk & Davidson; Hilborne & Co.*

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## MICHAEL v. SOON TECK FINANCE CO. & ANOR.

[O.C.J. (Ong J.) October 27, 1961]

[K.L. — Civil Suit No. 514 of 1960]

*Hire-purchase — Documents purporting to be agreement for hire purchase — Nature of transaction — Whether a sham to disguise a moneylending transaction.*

The plaintiff bought a car from one Cheong which was subject to a hire purchase agreement between Cheong and one E.T.S. Finance Co. and on which a sum of $2,400 was still due to the said company. The plaintiff paid $4,700 and $1,000 was to be paid when the transfer was effected. The E.T.S. Finance Co. on coming to know of this sale served a notice on Cheong informing him that he had contravened the provisions of the hire purchase agreement with them and requiring him to pay the balance of $2,400. Cheong then purported to enter into a further hire purchase agreement with the first defendants who undertook to pay the E.T.S. Finance Co. the $2,400 and did so. On receipt of this amount the E.T.S. Finance Co. notified the Registrar and Inspector of Vehicles of their withdrawal of ownership of the said car. The first defendant immediately gave notice of ownership. Some time later the first defendant seized the said car whilst it was still in the possession of the plaintiff for default of instalments due from the said Cheong. The plaintiff then proceeded to the office of the first defendant and paid the sum of $702 being three months' arrears of instalments and secured the release of the car to himself. He then, by obtaining a duplicate of the registration card, registered himself as owner (after managing to get Cheong's signature on the prescribed transfer form). The car was later again seized by the first defendant but it was found that the original registration card showed Cheong as owner. The plaintiff now claims against the first defendant damages for conversion and against the second defendant the return of the car or its value.

**Held:** the hire-purchase agreement between Cheong and the first defendant was a sham to disguise a moneylending transaction and the entire transaction was consequently struck at by the Bills of Sale Ordinance and was void. Accordingly no valid title to the car passed to the first defendant whose seizure of the vehicle and subsequent dealing with it amounted to conversion.

*Cases referred to:—*

(1) *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185, 188.

(2) *Yorkshire Railway Wagon Co.* v. *Maclure* (1882) 21 Ch. D. 309; 51 L.J. Ch. 857.